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# In the Supreme Court

OF THE  
**United States**

OCTOBER TERM, 1984

STATE OF MONTANA, et al.,  
*Petitioners,*

VS.

BLACKFEET INDIAN TRIBE,  
*Respondent.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit

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## **AMICUS BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF APPELLEE STATE OF MONTANA**

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## **INTEREST OF AMICUS CURIAE**

The State of California on behalf of the California State Board of Equalization submits this brief pursuant to Rule 36 as amicus curiae in support of appellee the State of Montana. Rule 36.4 provides that California is not required to obtain the consent of the parties to file an amicus curiae brief.

This case is of interest to California because this Court's decision may affect the validity of certain California taxes imposed on non-Indians engaged in commercial activity with Indian tribes and tribal members.

## **SUMMARY OF ARGUMENT**

California imposes the property tax on possessory interests in real property that is itself exempt from the property tax and a timber yield tax on the ownership of felled

timber. The taxes are imposed on non-Indians who have lease interests in Indian trust lands or who purchase Indian timber. The revenues from both taxes are used to fund government services provided to reservation Indians; in this respect the taxes differ from the taxes invalidated in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) and *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982).

The only issue in this case is the correctness of the Ninth Circuit's ruling that Montana's severance tax may be applied to Indian royalties received under 1924 Act leases but not Indian royalties received under 1938 Act leases. Since the California taxes are not imposed on Indians and are not claimed to be valid under either the 1924 Act or the 1938 Act, the decision in this case need not include a discussion of the validity of taxes such as the California taxes. Instead, given the importance of such taxes to the states and the substantial arguments to be made in favor of their validity, this Court should refrain from a broadly worded decision in this case and instead should defer their consideration until a case is before this Court in which the issue is directly presented and the facts and arguments have been fully developed.

### ARGUMENT

California, unlike Montana and the other amici states, does not have a mineral severance tax, and little if any Indian trust land in California is subject to mineral leases executed under the 1924 and 1938 Acts.<sup>1</sup> Whether Indian

<sup>1</sup>A bill proposing a tax on mineral royalties is now pending in the California Legislature.

mineral royalties from such leases may be taxed by the states is therefore not a matter of direct present concern to California.

However, California is concerned that a broadly worded decision on the narrow question of the proper interpretation of the 1924 and 1938 Acts may touch upon a different issue which is of more general importance, i.e., the right of a state to impose a tax upon a non-Indian engaged in commercial activity with an Indian tribe if the revenue from the tax does not directly support the taxed activity but nevertheless funds services which are used by the tribe and tribal members.

It has been argued that two recent decisions of this Court, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) and *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), cast doubt upon the validity of such taxes. However, as is discussed below in more detail, *White Mountain* and *Ramah* each involved a state tax whose revenues did not benefit the Indian tribe which bore the ultimate economic burden of the tax. California therefore submits that the validity of a tax whose revenues do benefit the tribe affected by the tax is a controversy which this Court has not yet been called upon to confront directly.

There is no reason why this Court, in deciding a narrow question about the legislative intent behind the enactment of the 1938 Act, should also deal with the separate issue of the right of a state to tax in return for services rendered. Instead, such a discussion should await a case in which the issue is squarely confronted, thereby ensuring that the facts will be fully developed in the record on appeal and the

arguments fully briefed. Such an opportunity may be presented in a case now pending in the United States District Court for the Northern District of California, involving a Supremacy Clause challenge to the validity of the California timber tax. *Hoopa Valley Tribe, et al. v. Nevins* (N.D. Ca. No. C 82 5903 MHP).

The remainder of this brief describes in more detail the California property tax and timber yield tax as applied to Indian leases and timber and shows that there is a legitimate dispute about the appositeness of *White Mountain* and *Ramah*. Since this brief is not intended to persuade this Court to resolve the dispute, no attempt has been made to present a complete discussion of the pertinent facts and authorities.

The California *ad valorem* property tax is levied by the various California counties on all property within their respective jurisdictions and constitutes a principal source of revenue for county mandatory and discretionary expenditures. Among the properties subject to the property tax are possessory interests, which include lease interests in real property if the real property itself is exempt. A number of California counties impose the property tax on possessory interests in Indian trust land. On two occasions the Ninth Circuit has held that such possessory interests do not share the immunity from the state taxation of the Indian trust land itself. *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), involving a hotel lease; *Fort Mojave Tribe v. San Bernardino County* 543 F.2d 1253 (9th Cir. 1976) involving economic development leases. Although the legal incidence of the tax falls upon the non-Indian leasee, the

Ninth Circuit has recognized that the imposition of the tax "had an economic effect on the Indian lessor." *Ft. Mojave Tribe, supra* at 1256.

The California timber yield tax law (Cal. Rev. & Tax. Code § 38101 et seq.), which came into effect in 1977, resulted from the Legislature's awareness that the application of the property tax to standing timber on private lands and to possessory interests in standing timber on exempt lands, including Indian trust lands, encouraged premature harvests and otherwise was a substantial disincentive to the maximization of California's timber resources. The timber yield tax law eliminates the property tax as applied to timber and instead imposes a tax on the owner of felled timber. If the owner is exempt from taxation under federal or state law, such as an Indian tribe, the tax is imposed on the first non-exempt person to obtain title to the timber. The tax is administered by the California State Board of Equalization, which collects and then distributes the revenues among the counties, each county receiving the amount of revenue generated within its boundaries.

The validity of the timber yield tax as applied to Indian timber is at issue in *Hoopa Valley Tribe, supra*, now pending in the Northern District of California. The reservation of plaintiff the Hoopa Valley Tribe is located in Humboldt County in Northern California. The reservation is heavily wooded, and timber is the principal source of tribal revenue. Although the Bureau of Indian Affairs ("BIA") has exclusive management jurisdiction over tribal timber resources, the state and county expenditures for such services as schools, roads, welfare and police enhance

nearly every other aspect of life on the reservation. The total annual cost of these services allocable to tribal members living on the reservation exceeds, at a conservative estimate, at least \$1,500,000 a year. This amount is roughly the same, if not more than, federal expenditures for the tribe and tribal members and far exceeds the approximately \$147,000 a year in timber yield tax revenue received from the non-Indian purchasers of Hoopa timber. Since the reservation is immune from the property tax and tribal members are immune from state taxation on reservation-generated revenue, the timber yield tax provides the only source of government revenue derived from the reservation sources.

On July 19, 1984, Judge Marilyn Hall Patel granted the tribe's motion for partial summary judgment against defendant the California State Board of Equalization. The judgment when entered will be appealed.

Judge Patel concluded that the California timber yield tax could not survive the preemption analysis mandated by this Court in *White Mountain* and *Ramah*. Although there is no court action now pending concerning the constitutionality of the counties' taxation of non-timber possessory interests in Indian trust land, if such an action is brought, the plaintiff presumably will likewise rely upon these decisions.

Since this brief, as noted above, has a limited scope, the following is only a summary of the arguments California will make to the Ninth Circuit in the *Hoopa Valley Tribe* appeal concerning *White Mountain* and *Ramah*.

*White Mountain* arose out of logging operations conducted on the Fort Apache reservation in Arizona. The

Apache Tribe contracted out the harvest of tribal timber to Pinetop, a non-Indian logging company. Arizona imposed two taxes on Pinetop—a motor license tax and a use fuel tax. This Court explicitly recognized that revenues from the use tax were used to compensate Arizona for the use of its highways. (*White Mountain, supra* at 139.) Although the decision does not describe the purpose of the license tax, Arizona law is clear that revenues from the license tax may be expended only for purposes relating to the state road systems. (Arizona Const. Art. 9, sec. 14; Arizona Rev. Stats. 28-1550 et seq.)

There were three types of roads on the reservation: state roads, BIA roads and tribal roads. Arizona conceded that the taxes could not be imposed on Pinetop's use of tribal roads, and the Apache tribe did not contest the imposition of the tax on Pinetop's use of state roads. Thus, the sole issue before this Court was whether taxes used to fund state roads could be imposed on the use of roads which were maintained not by Arizona but by BIA.

The Supreme Court's analysis consisted of the balancing test—"a particularized inquiry into the nature of the state, federal and private interests at stake." (*Supra* at 145.) The inquiry led to the conclusion that there was no significant state interest because Arizona was attempting to tax for the use of a service—public roads—which it did not provide:

"As noted above, this is not a case in which the state seeks to assess taxes in return for governmental functions it performs for those upon whom the taxes fall.

"And, equally important, respondents have been unable to identify any regulatory function for services performed by the state that would justify the assess-

ment of taxes for activities on Bureau or tribal roads within the reservation. . . . Though at least the use fuel tax purports to compensate the state for the use of its highways (citation omitted), no such compensatory purpose is present here. The roads at issue have been built, maintained and policed exclusively by the federal government, the tribe and its contractors." (*Supra*, at 148-50.)

*Ramah* also involved a situation in which a state was attempting to tax for services which it did not provide. In 1968 New Mexico closed the only public high school available to students residing on the reservation of the Ramah Navajo Tribe, which consequently was forced to obtain congressional funding to build a high school on the reservation for the education of its children. The Tribe entered into a contract for construction of the high school with a non-Indian contractor. New Mexico taxed the gross receipts of the contractor attributable to the contract.

Using the balancing test among federal, state and tribal interests mandated by *White Mountain*, the Supreme Court held against the imposition of tax:

"In this case, the state does not seek to assess its tax in return for the governmental function it provides to those who must bear the burden of paying the tax. Having declined to take any responsibility for the education of these Indian children, the state is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education—a scheme which has left the state with no duties or responsibilities." (*Supra*, at 843. Emphasis added.)

But the tax would have been upheld if New Mexico had not closed the high school:

"This case would be different if the state were actively seeking tax revenues for the purpose of con-

struction, or assisting in the efforts to provide adequate educational facilities for Ramah Navajo children." (*Supra*, at 843, Fn. 7.)

The California property tax and timber yield tax are completely different from the taxes invalidated in *White Mountain* and *Ramah*. The California taxes, unlike the Arizona license and use taxes, are general fund taxes whose revenues fund services provided to tribal members. California, unlike New Mexico in *Ramah*, has not abdicated its responsibilities to tribal members; the services enhance nearly every aspect of reservation life.

In *Ramah*, this Court was unpersuaded by New Mexico's argument that, although education services had been withdrawn, the tax was justified by the existence of other government services unrelated to education. (*Ramah, supra*, at 845, fn. 10.) This Court observed that New Mexico's evidence was "far from clear" because some state services were funded by the federal government and because in any event New Mexico had saved approximately \$380,000 by not educating Tribal children.

The considerations which led this Court to reject New Mexico's argument will not apply to California's defense of its taxes. California has not withheld any services from any Indians who instead receive all services available to non-Indians. The record before the court in *Hoopa v. Nevins* establishes that the cost of the various government services provided to members of the Hoopa Tribe is at least \$1,500,000 a year, or more than ten times the revenues from the yield tax.

Since the amount of revenue collected from other California taxes which are either imposed or have an economic

effect on the Hoopa Tribe or its members is *de minimus*, the yield tax is the only tax which compensates California for even a small portion of the cost of the services which it provides to Tribal members living on the reservation.

### CONCLUSION

This Court should limit its discussion in this case to the only issue decided by the Ninth Circuit—the taxation by Montana of Indian royalties paid under leases executed pursuant to the 1924 and 1938 Acts. California accordingly requests this Court not to issue a broadly worded decision which might touch upon the validity of state taxes such as the California property tax on possessory interests and the timber yield tax. This Court should instead defer a discussion of such taxes to a case in which the pertinent facts and arguments have been fully developed and briefed.

Respectfully submitted,

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